RECENT ENGLISH DECISIONS.

High Court of Justice, Chancery Division.

FRITZ v. HOBSON.

The right which members of the public have to use a public highway is not an absolute right, but must be exercised in a reasonable manner, regard being had to all the circumstances of the case.

Where a builder has three ways of access to a building site, and uses only one, and that principally at the busiest hours of the day, causing special or particular damage to another person, such user is not reasonable.

Where the private right of an owner of land to access to the road is unlawfully interfered with, he is entitled to recover damages from the wrongdoer to the extent of the loss of profits of the business carried on by him on his premises.

A person is entitled to recover damages for a private injury resulting from a public nuisance, where there is a particular, a direct and a substantial damage to him, such as that arising from an unreasonable obstruction to the access to his premises from the road, occasioning loss of profits.

Benjamin v. *Storr*, L. R. 9 C. P. 400, considered and followed. *Ricket* v. *Metropolitan Railway Company*, L. R. 2 H. L. 175, distinguished.

Where damages are sought in the Chancery Division under Lord Cairns's Act, in substitution for an injunction, in respect of wrongful acts which have continued after the issue of the writ, but have come to an end before the trial of the action, the entire damages occasioned by the whole of the wrongful acts are recoverable.

THIS was an action for trespass and nuisance in the course of the defendant's building operations on premises adjacent to the plaintiff's. The plaintiff was a tailor, and also a dealer in old china and other curiosities, carrying on business on leasehold premises, having a western frontage of six feet towards Fetter lane, Fleet street, and a southern frontage of forty-four feet towards a narrow passage leading from Fetter lane eastwards into Fleur de Lys court. Fleur de Lys court ran past the eastern frontage of the plaintiff's premises, and after continuing for some distance in the same southerly direction, and parallel to Fetter lane, turned westwards into Fetter lane.

On the opposite side of Fleur de Lys court, and facing the south-eastern angle of the plaintiff's premises, were premises belonging to the Scottish Corporation, on which the hall of the corporation stood until its destruction by fire. After that event, the defendant, a builder, was employed by the corporation to rebuild the hall, and he commenced his operations on or about May 21st 1879. There were three passages by which it was possible to obtain access to the site of the new hall, viz.: first, by the passage which ran past the

plaintiff's premises, and which was five feet nine inches in width, and the whole length of which, from Fetter lane to the western boundary of the new hall, was only fifty feet; second, by Fleur de Lys court; and third, by Crane court, running southwards into Fleet street. The distance of the site of the hall from Fetter lane through Fleur de Lys court, and from Fleet street through Crane court, was considerably greater than the distance from Fetter lane through the plaintiff's passage. It was proved at the trial that all the heavy building materials and very nearly all the light materials were taken through the plaintiff's passage.

On August 7th 1879, the plaintiff commenced the present action. By his statement of claim he alleged that the defendant had carried on his building operations negligently and without proper care and precautions, and that he had caused the same to be a continual nuisance to the plaintiff and persons living in his house, and had thereby done injury to the plaintiff.

The statement of claim then went on to detail the particulars in which the defendant was alleged to have injured the plaintiff, viz., by placing iron girders, stones and other articles against the plaintiff's doorways, and committing similar acts of trespass; by creating an unnecessary quantity of dirt and dust; by preventing access to the plaintiff's premises, and unreasonably blocking up the street, *i. e.*, Fetter lane; by blocking up windows, and so interfering with the plaintiff's ancient lights. And the plaintiff alleged that by reason of the acts aforesaid, his business, as a dealer in curiosities, had fallen off, and his monthly takings diminished from 40*l.* to 9*l.*; that he had also suffered in his business as a tailor, and from the loss of lodgers, and had been put to expense and inconvenience in other respects. The plaintiff further alleged that the passage by the side of his house was a private entrance, for the use only of himself and foot passengers going to the houses in Fleur de Lys court, and that the defendant had no right to use the passage for his building operations. And he claimed an injunction to restrain the defendant from continuing or repeating the alleged trespasses and nuisances, and damages. Before the hearing, however, the building was completed, and the acts complained of had come to an end, so that the action was resolved into an action for damages.

By his statement of defence, the defendant denied that the passage was a private entrance, and he denied the other allegations of the plaintiff *seriatim*, and generally that there had been any

negligence or want of care and precautions in his building operations, and he alleged that for various reasons the plaintiff's passage was the only one of the three routes of access to the building site by which it was possible to convey heavy materials.

This was the hearing of the action with witnesses.

North, Q. C., and *Seward Brice*, for the plaintiff.—The defendant has exceeded his rights, and has injured the plaintiff to a considerable extent, and the plaintiff is entitled to have his losses made good by the defendant: *R.* v. *Cross*, 3 Camp. 224; *R.* v. *Jones*, Id. 230; *R.* v. *Russell*, 6 East 427. The real question is whether the user by the defendant has been reasonable: *Cory* v. *Thames Iron-works Company*, L. R. 3 Q. B. 181; *Tipping* v. *St. Helen's Smelting Company*, 4 B. & S. 608.

Cookson, Q. C., and *Northmore Lawrence*, for the defendant.—The main question at issue in this case is with regard to the loss of custom, which really includes the loss of lodgers. The loss which the plaintiff has sustained in this respect, if it exists at all, has been very greatly exaggerated; but, in any case, the damage sustained is too remote, and the plaintiff cannot recover in respect of it. The decision of the House of Lords in *Ricket* v. *Metropolitan Railway Company*, L. R. 2 H. L. 175, affirming that of the Exchequer Chamber, 5 B. & S. 149, and overruling *Wilkes* v. *Hungerford Market Company*, 2 Bing. N. C. 281, is a distinct authority in favor of this proposition.

FRY, J., stated the facts of the case, and referring, in the first place, to the alleged trespass, which he considered to be of the most trifling description, awarded the plaintiff damages to the extent of one farthing in respect thereof. He then continued:

The serious part of the plaintiff's case arises from his allegation of the loss of custom to him in his character of a dealer in articles of antiquity, old china and so forth, and of a tailor. With regard to the latter, there is no evidence of loss. With regard to the former, I shall consider it hereafter.

The plaintiff puts his case in two ways. He says, in the first place, that the defendant has created a public nuisance, which public nuisance has resulted in special or peculiar damage to me, in consequence of the place where I reside and that where the nuisance has been committed being so near to one another; and, in

the next place, I have a private right of entrance from the highway to my dwelling-house, and with that private right you have interfered.

Before I consider those rights separately, I must inquire whether the user by the defendant of the roadway of Fetter lane and the passage has been reasonable or unreasonable. The law with regard to the point appears to me to be easily gathered from one or two cases. The case of *R.* v. *Jones* has been referred to. There Lord ELLENBOROUGH says, as to the repairing of a house, "The public must submit to the inconvenience occasioned necessarily in repairing a house; but if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance." Again, in *Benjamin* v. *Storr*, Law Rep. 9 C. P. 400, the question left by Mr. Justice HONYMAN to the jury was "whether or not the obstruction of the street was greater than was reasonable in point of time and manner, taking into consideration the interests of all parties, and without unnecessary inconvenience," he telling them they were not to consider solely what was convenient for the business of the defendants. The defendant at the bar has asserted an unqualified and absolute right to approach the area of the building operations which he was carrying on by the nearest road, to any extent, for any materials, for any time, and without regard to the plaintiff's convenience or inconvenience. Such a claim is, in my judgment, untenable. It appears to me to be the expression of the selfish and not of the social man—of the man who recollects his rights, but who does not recollect his obligations; and human life could not be carried on if such extreme rights were asserted and insisted on.

The question I have to inquire into is whether the user of the road or the roads in question by the defendant was, having regard to all the circumstances of the case, reasonable. The circumstances are undoubtedly peculiar. The block of buildings which the defendant had to erect was capable of being got at from roads only by means of three passages—Crane court, leading from Fleet street; Fleur de Lys court, leading from the southern part of Fetter lane; and what has been called for convenience the plaintiff's passage, or the plaintiff's court, leading directly from the northern part of the site into Fetter lane. That last passage was undoubtedly the most convenient mode of access for the defendant to the site. It was the most convenient for several reasons. It was the shortest, and

it also led to that portion of the property which the defendant used as a yard for the purpose of his building operations. It must be further observed that the operations which the defendant had to carry on were very considerable. The building contract was for nearly 6000*l.* A very large quantity of old buildings and rubbish had to be removed—a quantity that took from the 21st of May to the 9th of July in removing. A very large quantity of materials had to be carried in for the purpose of the new hall and chapel which the defendant erected for the Scottish Corporation—operations which lasted for several months. Under these circumstances, it appears to me that to carry on the whole of the defendant's operations through what has been called the plaintiff's passage was not reasonable. I am unable to see any reason why a large proportion of the old materials might not have been carried down Crane court, and why a much larger proportion might not have been carried down Fleur de Lys court, and the inconvenience necessarily created by carrying away rubbish of that character distributed over the whole of the passages that gave access to the site. Further than that, it appears to me that the defendant, having regard to the peculiar difficulties of the case, should have made some different arrangement with regard to the time during which his operations were carried on. In fact, he carried them on during the busiest and most occupied hours of the day, and took no pains to diminish the inconvenience by carrying on his operations early in the morning or late at night. What was the result upon the plaintiff of these operations so carried on by the defendant? Undoubtedly the passage close by his house was practically devoted to the building operations of the defendant for a long period of time. For exactly how many days it was unsafe to cross that passage I do not know, but certainly for months these operations went on, and it appears to me that they went on in such a manner as to render it exceedingly difficult, if not impossible, for persons to obtain access to the plaintiff's premises from Fleet street, coming up on the eastern side of Fetter lane, and the natural effect of it would be to drive persons away who might have become customers, and to render the access to the plaintiff's house so difficult that most persons would abandon passing along that side of the road; and there is some evidence that persons who were in the frequent habit of going to the plaintiff's house as customers ceased to do so during a portion of the time these operations were going on.

What has been the result of these operations, therefore, to the plaintiff? I have come to the conclusion that the plaintiff has proved that he has sustained considerable loss in his business as a dealer in old curiosities, in consequence of the defendant's operations, and although it is very difficult to assess the amount of that loss, I have, sitting as a judge of fact, arrived at the conclusion that he has sustained loss to the extent of 60*l.*

Then arises the question, or questions, how far this state of circumstances gives rise to any legal right in the plaintiff. Now the cases of *Rose* v. *Groves*, 5 M. & G. 613, and *Lyon* v. *Fishmongers' Company*, L. R. 1 App. Cases 662 in the House of Lords, appear to me to establish this: that where the private right of the owner of land to access to the road is interfered with, and unlawfully interfered with, by the acts of the defendant, he may recover damages from the wrongdoer to the extent of the loss of profits of the business carried on at that place. The case of *Rose* v. *Groves* was that of an owner of a riparian property, but it is referred to by the lord chancellor in the case of *Lyon* v. *Fishmongers' Company*, and he cites there an observation of Lord HATHERLEY in another case to this effect: "I apprehend that the right of the owner of a private wharf, or of a roadside property, to have access thereto, is a totally different right from the public right of passing and repassing along the highway on the river." Then the lord chancellor continues: "The existence of such a private right of access was recognised in *Rose* v. *Groves*. As I understand the judgment in that case, it went, not on the ground of public nuisance, accompanied by particular damage to the plaintiff, but upon the principle that a private right of the plaintiff had been interfered with." Then, after more fully examining that case, and expressing not the slightest intention to differ from it, his lordship says: "Independently of the authorities, it appears to me quite clear that the right of a man to step from his own land on to a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road. And though it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right." Applying that principle to the present case, it does appear to me that

the evidence shows that the access to the plaintiff's door in the passage from the street was interfered with by the acts of the defendant, which I hold to be unreasonable, and, therefore, wrongful, and that being so, the cases to which I have referred are authorities for the plaintiff on that ground, and entitle him to recover the amount of loss in his business carried on upon his property.

But I will consider the case further, on the ground of the private injury resulting from the public nuisance. The conditions under which a private person may recover in such a case as that are well expressed in the judgment of Lord Justice BRETT, then a member of the Court of Common Pleas, in the case of *Benjamin* v. *Storr*, L. R. 9 C. P. 400. "The cases referred to upon this subject," his lordship says, "show that there are three things which the plaintiff must substantiate, beyond the existence of the mere public nuisance, before he can be entitled to recover. In the first place, he must show a particular injury to himself beyond that which is suffered by the rest of the public." Now, I ask whether in this case the plaintiff has or has not sustained that particular injury from the public nuisance? It appears to me that he has. The case of *Iveson* v. *Moore* is a case of great authority. It is reported in numerous books. It has found its way into the various digests of the law, and has been cited with approval in the great case of *Ricket* v. *The Metropolitan Railway Company*, L. R. 2 H. of L. 175, by the Court of Exchequer Chamber, and the case itself was decided by the Court of Exchequer Chamber. Now, as cited in Comyn's Digest, 5th ed., vol. 1, p. 278, that case resulted in this: "If A. has a colliery, and B. stops up a highway near it, whereby nothing can pass to such colliery, an action upon the case lies, for he ought to be remedied in particular, though it was a highway for all." And, accordingly, in the case of *Benjamin* v. *Storr*, the learned judge before referred to considered that, "if, by reason of the access to his premises being obstructed for an unreasonable time, and in an unreasonable manner, the plaintiff's customers were prevented from coming to his coffee-shop, and he suffered a material diminution of trade—that might be a particular, a direct and a substantial damage." No doubt, *Ricket's case* shows that where the obstruction is at a considerable distance and temporary, and the injury which the plaintiff sustains is only in common with a large number of other

persons, such a right of action does not arise; but it appears to me that this case is far more like the case of *Iveson* v. *Moore* and the case of *Benjamin* v. *Storr* than the case either of *Wilkes* v. *Hungerford Market Co.*, 2 Bing. N. C. 281, or the case of *Ricket* v. *Railway Co.*, *supra*, and that there is here that particular injury to the plaintiff, resulting from a public nuisance, which is referred to in those cases.

The second condition which is referred to by Lord Justice BRETT is this: "Other cases," he says, "show that the injury to the individual must be direct, and not a mere consequential injury." Now I have already considered that point, and the cases I have already referred to seem to show that this is sufficiently direct.

Lastly, "the injury must be shown to be of a substantial character, not fleeting or evanescent." What is the meaning of those words—"fleeting or evanescent?" It is not, perhaps, easy to answer that, but it appears to me that nothing can be deemed to be fleeting or evanescent which results in substantial damage, and that the question, therefore, is not one to be measured by time, but one to be measured by its effects upon the plaintiff; and, accordingly, in the case to which I have referred, and which, it appears to me, I am bound to treat as law, I find that the interruption for the course of one month of a public highway, was deemed sufficient interference to give the plaintiff a right of action, and that case, I repeat, is one which has been adopted and approved of by the Court of Exchequer Chamber in *Ricket's case*. The result, therefore, to my mind, is this—that even upon the ground of public nuisance, the plaintiff has made out his case, and it follows from what I have said that it appears to me that the plaintiff is entitled to a judgment to the extent of 60*l*.

But then this argument was raised by the defendant. It was said that the 60*l*. represents damages accrued to the plaintiff after the issue of the writ, and that the only thing which the court can now assess is the amount of damage sustained anterior to the writ, and that, therefore, the whole amount cannot now be recovered. Nothing that I intend to say will affect the general question whether the damages sought for by a writ, or by a counter-claim, go back to the date of the writ or counter-claim. What I have to consider is the power and duty of the court in a case in which, there being jurisdiction to grant injunctions, the court, in substitution for that injunction, grants damages under Lord Cairns's Act. Now, as we

all know, the power of the court given by that statute is, if it thinks fit, to grant damages in substitution for, or in addition to, an injunction, and I am now asked to give it in substitution for an injunction.

Now, it is manifest that no damages can be an adequate substitute for an injunction, unless the damages cover the whole area which would have been covered by an injunction, and that is often one difficulty in giving damages in lieu of an injunction; but here the circumstances are peculiar. The damages sought for are partly those accruing before the writ, and partly those accruing after the writ, but all before the trial; because this is a case in which the cause of the annoyance had come to an end before the trial of the action.

Ought I, under those circumstances, to refuse to give the entire damages which would cover the whole ground which the injunction might have covered, or am I to leave the plaintiff to bring a second action for the damages accruing between the issue of the writ and the conclusion of the operations of the defendant? It is manifest that to do the second would be to do a thing inconvenient, and one that seems to me to be at variance with the intention of Lord Cairns's Act, which was clearly intended to prevent the multiplicity of actions and the excess of costs.

It appears to me, however, that the question is covered by authority, and by authority cited to me by the defendant's counsel. In the case of *Davenport* v. *Rylands*, Lord HATHERLEY, sitting as vice-chancellor, had a case in which an injunction had been sought for in respect of the infringement of a patent. Before the case was heard, the patent had expired, and he was then asked to assess damages in lieu of the injunction. The first question raised was whether, the patent being gone, the injunction could be granted, or whether, if it could not be granted, the jurisdiction to give damages arose. The vice-chancellor held that he had jurisdiction. The next inquiry, of course, was what damages he should assess, and what he directed was this—an inquiry what damages the plaintiff had sustained, and he added—"The inquiry must extend to the sale by the defendants of any articles manufactured by them, within six years before the filing of the bill and up to the expiry of the patent, by that process the exclusive use of which was secured by the letters-patent in the bill mentioned." He, therefore, in that case did not stop the assessment of the damages at the

issuing of the writ, but continued it up to the termination of the wrong. I shall gladly follow that precedent, and direct that the whole sum which I have mentioned, and which, as I have said, includes the damages sustained subsequent to the issue of the writ, be paid by the defendant to the plaintiff.

From what I have said, it follows that the general costs of the action must be borne by the defendant; but considering that a portion of the plaintiff's claim was addressed to those frivolous trespasses I have mentioned, I shall disallow 10*l.* of the costs.

The main principle involved in the foregoing case is usually stated in such general terms as to give but little light as to its true meaning and extent, much less as to its practical application; that can best be gathered from a careful examination of the cases in which the rule has been considered and applied. Some conflict will, no doubt, appear among them. For, while all substantially agree as to the rule itself, they sometimes differ as to its application. Much of this confusion is, doubtless, owing to the terms sometimes employed when describing the kind of damages which give a right of private action for a public nuisance. Many call them "special" or "particular" damages, while "peculiar" is, apparently, a more appropriate word. Special, properly speaking, is not in contrast or opposition to general, but is included in and comes under it, as the species is included in the genus. Besides, the phrase "special damages" has a distinct and well-known meaning in the law quite different from that involved in the subject under consideration. "Particular," also, though a better word than "special," fails to bring out the precise idea. Etymologically, it applies to a particle or small part of a thing; it comes under special as that does under general—as a particular case or illustration of a special rule. Neither word exactly expresses the thought. A person might suffer both special and particular damage by a public nuisance, and yet have no cause of action. The word "peculiar," on the other hand, always implies something private; exclusively one's own; not common to the many; unlike any other person's. Particular qualifies that which belongs to one and the same kind; peculiar qualifies that which belongs to some particular individual or class; the very essence of the private action.

With this explanation, let us consider some of the cases in which the doctrine has been involved. They, for the most part, relate to obstructions in public highways, on land or water, and, naturally, range themselves into four classes.

1st. Where damage is claimed for mere inconvenience or inability of passing and repassing by the plaintiff himself, without regard to any estate he may have.

2d. Where the obstruction complained of is immediately in front of or adjacent to the plaintiff's premises, so that access thereto is directly and immediately impeded.

3d. Where the obstruction interferes with the access to and from the plaintiff's premises, at some distance more or less therefrom, and so naturally tends to depreciate its value.

4th. Where the damage alleged is mere loss of business and profits.

I. As to the first point, two things are obvious; one is, that no action will ever lie if the plaintiff did not attempt to use the way at all, but remained at home because of the obstruction. An indictment would, of course, lie, although no person had ever wanted or tried to use the way since the obstruction; the *possibility* of

inconvenience is sufficient; not so for the private suit. See *Baxter* v. *The Winooski Turnpike Co.*, 22 Vt. 114 (1849).

The other is, that if the plaintiff in attempting to use the way, sustains a direct injury in his person or property, an action will always lie. See *Sanders* v. *Fowler*, Cro. Jac. 446 (1619); *Marriott* v. *Stanley*, 1 M. & Gr. 568 (1840); *Goldthorpe* v. *Hardman*, 13 M. & W. 377 (1844); *Clark* v. *Lake*, 1 Scam. 229 (1835); *Martin* v. *Bliss*, 5 Blackf. 35 (1838).

It is in the border land, between these two extremes, where the difficulty arises. And, first, as to an action for mere delay or deviation caused by the obstruction. Thus, inconvenience merely, clearly does not sustain a private action.

As early as 1536, in Year Book 27 Hen. 8, page 27, pl. 10, where the plaintiff alleged that the defendant had stopped the "royal chemin," by which he used to carry and recarry his things from his close to his house, BALDWIN, C. J., said, that the party should be punished only by presentment in the leet for a common nuisance, and that if one could maintain an action another might, and so the party might be punished a hundred times for the same cause.

In Co. Litt. 56 a, it is said a diversity exists between a private way and a common way; for, if the way be a common way, if any man be disturbed to goe that way, or if a ditch be made overthwart the way so as he cannot goe, yet shall he not have an action upon his case, and this the law provided for avoiding of multiplicity of suites; for if any one man might have an action, all men might have the like. But the law for this common nuisance hath provided an ample remedy, and that is by presentment in the leete, or in the torme, unless any man hath a particular damage, as if he and his horse fell into the ditch, whereby he received hurt and losse, there for this special damage, which is not common to others, he shall have an action on his case, and all this was resolved by the court in King's Bench.

The leading case, perhaps, is *Fineux* v. *Hovenden*, Cro. Eliz. 664 (1599). The plaintiff there alleged "there had been a way within the city of Canterbury, leading from St. Peters' street into a street called Rush-market; and that all the inhabitants of the city used, time whereof, &c., to pass that way; and that the plaintiff was an inhabitant there; that the defendant had made a ditch and erected a pole across that way, *whereby he had lost his passage*, &c." But, after verdict for the plaintiff, it was held by POPHAM, GAUDY and FENNER, "that without a special grief shown by the plaintiff, the action lies not," but it is punishable in the leet. See, also, *Anon.*, Moore 180, No. 321.

Again, in *Paine* v. *Patrich*, Carth. 194; 3 Mod. 289 (1690), HOLT, C. J., said that if a highway be stopped that a man is delayed a little while on his journey, by reason whereof he is damnified, or some important affair neglected, that is not such a special damage for which an action of the case would lie; but that the damage ought to be direct and not consequential, as the loss of his horse, or some corporal hurt in falling into a trench in a highway.

This last proposition, probably, is not the modern law, that the damage must be so direct and immediate as the loss of a horse or some corporal injury. See 22 Vt. 114.

In *O'Brien* v. *Norwich & Worcester Railroad Co.*, 17 Conn. 372 (1845), the plaintiff was the owner of premises on navigable waters, and the defendants were about to construct a railroad across them, which would interfere with the passage of boats, &c., to and from the plaintiff's premises; and he brought a bill for an injunction, not alleging any special injury *to his estate*, but only an interference with the common right of passing and repassing, and it was held no private injury for which a bill would

lie. And the same principle was again applied in *Leeley* v. *Bishop*, 19 Conn. 128 (1848), for obstructing a navigable creek by a dam, to the prevention of passing and repassing merely.

Mechling v. *The Kittanning Bridge Co.*, 1 Grant 416 (1856), is much like *O'Brien's Case*. See, also, *Bigelow* v. *Hartford Bridge Co.*, 14 Conn. 556 (1842); *Clark* v. *Saybrook*, 21 Id. 314 (1851); *McCowan* v. *Whitesides*, 31 Ind. 235 (1869); *Johnson* v. *Stayton*, 5 Harr. (Del.) 362 (1852).

So in *Hartshorn* v. *South Reading*, 3 Allen 501 (1862), it was held a bill in equity would not lie to abate a nuisance in the erection of a fence across a highway by one whose land did not abut directly upon it, and who was only injured in common with others, by being deprived of the use of the highway, although by reason of proximity his occasion to use it was more frequent, and the inconvenience, therefore, to him, greater than that to which other persons might be subject. And see *Brainard* v. *Connecticut River Railroad Co.*, 7 Cush. 511 (1851).

Winterbottom v. *Lord Derby*, Law Rep. 2 Ex. 316 (1867), is the most modern important English case on this point. There it was distinctly adjudged after full argument, and on a consideration of many cases, that if the plaintiff proves no special damage to himself beyond being delayed on several occasions in passing along a highway, and being obliged, in common with all others using the way, either to pursue his journey by a less direct road or to remove the obstruction, he cannot sustain an action. In the argument it was urged that an indictment for obstructing a highway is grounded upon the mere *possibility*, and not on the fact of the public being prevented from using it, but that any one who actually suffers positive inconvenience personally from the obstruction may have his action, and that *actual delay* is a cause of action, whether caused by stopping to remove the obstruction or by going a less convenient way. But this was not sustained; KELLY, C. B., saying: "In this case, where there was no pecuniary damage, where the plaintiff, on one or more occasions, merely went up to the obstruction and returned, and on other occasions went and removed the obstructions; that is to say, he suffered an inconvenience common to all who happened to pass that way. I think that to hold the action maintainable would be equivalent to saying *it is impossible to imagine circumstances in which such an action could not be maintained.*" See, also, *Carpenter* v. *Mann*, 17 Wis. 155 (1853); *Houck* v. *Wachter*, 34 Md. 265 (1870).

Possibly, some cases may have sanctioned a broader rule than above laid down. Thus, in *Pittsburgh* v. *Scott*, 1 Penn. St. 309 (1845), the defendant had piled boards in one of the public streets of the city of Pittsburgh, which had caused some deviation to carts, &c., employed by the city authorities in carrying dirt and other materials for the use of the city; that this was no more inconvenient to the city than to others who might have occasion to pass that way; but the city was allowed to maintain the action; but this certainly goes to the extreme.

Passing from the mere delay or inconvenience of taking a different route, it seems equally clear that if such delay does cause peculiar damage, either to the person or property of the plaintiff, this gives a right of action.

Thus, in *Maynell* v. *Saltmarsh*, 1 Keb. 847 (1666), the defendant erected posts in the highway, through which the plaintiff passed to and from his land in another village, and in consequence of the delay from the obstruction he alleged his corn was corrupted and spoiled, and this was held sufficient damage to sustain the action; possibly, because it did not appear that there was any other way by which he could reach his close, and so his injury was of a different kind from that of others.

Hart v. *Bassett*, T. Jones 156 (1682), is often referred to in this connection. The plaintiff alleged that he was entitled to certain tithes of the parish of B., and was possessed of a certain barn into which he was going to carry and deposit his tithes, and that the direct way to carry them to his barn was by a certain highway, which the defendant obstructed by a ditch and gate across it, by reason whereof "he was forced to carry them by a longer and more difficult way." After verdict for 5*l.* damages, it was moved in arrest of judgment that this way, being alleged to be a highway, the obstruction was a common nuisance, and this damage is not such for which an action will lie, for then every one who had occasion to go this way might have his action, which the law will not suffer, for the multiplicity. And *Williams's case*, 1 Inst. 59, was cited for it. But, resolved by the whole court (Banco Regis), that the action lay. And it was said that the common rule ought not to be taken too largely. But in this case the plaintiff had particular damage, "for the labor and pains he was forced to take with his cattle and servants by reason of this obstruction, may well be of more value than the loss of a horse, or such damage as is allowed to maintain an action in such a case. Judgment for the plaintiff."

But this case has been explained by saying that the plaintiff, being a farmer of tithes, was *obliged* to take them, and was liable to an action if he did not take them away within a reasonable time, or allowed the tithe to be injured on the ground. He was therefore obliged to expend extra money in the discharge of his lawful calling in consequence of the obstruction; and that fact made it a peculiar pecuniary damage suffered by him personally. See Law Rep., 2 Ex. 321.

In *Chichester* v. *Lethbridge*, Willes 71 (1738), the defendant obstructed the highway by a ditch or gate across the road, by means of which the plaintiff was compelled to go, and did go, several times, a longer and more difficult way to and from his premises, *and also the defendant in person opposed the plaintiff in attempting to remove the nuisance*, and prevented him from removing the obstruction, and the action was sustained. And the latter ground has been thought to be the most tenable. The obstruction being a nuisance, the plaintiff had a legal right to abate it and pass on; but being prevented from abating it, he was entitled to bring his action. See Law, Rep. 2 Ex. 319.

In *Hughes* v. *Heiser*, 1 Binn. 463 (1808), the defendant had obstructed the Schuylkill river, a public stream, by the erection of a dam, so constructed that the plaintiff's rafts could not pass over it, and on reaching the dam he was actually prevented from taking it down and so lost the voyage. He was allowed to recover 40*l.* damages, not because his timber land was rendered less valuable because of the obstruction to navigation, for this might be common to many others, but because his own damage was palpable and peculiar to himself.

Rose v. *Miles*, 4 M. & S. 101 (1815), is a very important case on this point. The defendant obstructed a public navigable creek by mooring his barge across the same, thus actually preventing the plaintiff from navigating his loaded barges, and so he was compelled to carry his goods overland at great expense, and the action was supported.

And Lord ELLENBOROUGH said: "In *Hubert* v. *Groves*, 1 Esp. 148, the damage might be said to be common to all, but this is something different, for the plaintiff was in the occupation, if I may so say, of the navigation; he had commenced his course upon it, and was in the act of using it when obstructed. It did not rest merely in contemplation. Surely this goes one step further; this is something substantially more injurious to this person than

to the public at large, who might only have it in contemplation to use it. If a man's time and money are of any value, it seems to me this plaintiff has shown a particular damage."

DAMPIER, J., added: "The final case, I think, admits of this distinction from most other cases, that here the plaintiff was interrupted in the actual enjoyment of the highway. The expense was incurred by the immediate act of the defendant, for the plaintiff was forced to unload his goods and carry them overland. If this be not a particular damage, I scarcely know what is." See, also, *Wiggin* v. *Boddington*, 3 C. & P. 544.

In *Greasly* v. *Codling*, 2 Bing. 263; 9 Moore 489 (1824), the defendant obstructed the highway, on which the plaintiff was accustomed to carry his carts, and he was actually detained four hours with three loaded asses, and could not carry as many loads in a day by the circuitous route he was obliged to take, and a verdict for the defendant was set aside; presumably on the case of *Rose* v. *Miles*.

In *Brown* v. *Watson*, 47 Me. 161 (1859), the plaintiff was returning home with a *loaded team*, and found the road wholly obstructed by logs and trees felled across it by the defendant, and which he could not then remove; he was compelled to go back with his load and reach his house by another road, a distance of about two miles. For "the trouble and loss of time thus arising," he was allowed to recover, upon the authority of *Giesly* v. *Codling*, and *Rose* v. *Miles*.

Enos v. *Hamilton*, 27 Wis. 256 (1870), is another excellent illustration of special damages. The plaintiff alleged that he owned a tannery on a river, and the only place he could procure his tan-bark was above his works at a certain place on the stream, and the defendant totally obstructed the same with logs and lumber, by which he was obliged to suspend operations and his men were a long time idle; and the action was sustained, as clearly it should have been.

In *Dudley* v. *Kennedy*, 63 Me. 465 (1874), the plaintiff had contracted to transport a quantity of gravel, rocks, &c., down the Kennebec river, a public navigable stream, but was prevented by the erection of a boom across the river by the defendant, "whereby he was unable to pass and perform his contract, and was deprived of the employment of his scows, and obliged to remain idle for twenty days or more," and he was permitted to recover for such damages, as being "over and above those inflicted upon the general public."

And in the light of the foregoing authorities, it may well be doubted whether the Court of Appeals in South Carolina did not swing too far the other way, when they held in *Casey* v. *Brooks*, 1 Hill 365 (1833), that a plaintiff had no remedy by action, who, in navigating a stream with his raft, was delayed by the defendant's obstructions about a month, and was obliged to pay $125 to clear out the channel so that he could pass, and also incurred a penalty for not delivering his lumber below at a fixed time by his contract. But the case was cited subsequently with apparent approbation in *McLauchlin* v. *Railroad Co.*, 5 Rich. 592.

How small a damage actually incurred will support a private action is well illustrated by the case of *Pierce* v. *Dart*, 7 Cowen 609 (1827). The defendant erected a fence across a public highway, and the plaintiff in going to and from church, was obliged to stop and pull it down in order to pass; this he did four times, the whole time being but a trifle, and not estimated by any witness loss to be over twenty-five cents for the whole four times; but this was held sufficient to warrant a special action, and the cases were carefully examined. Still, the courts of that state usually apply the

general rule with great strictness in some other cases.

In *Lansing* v. *Wiswall*, 5 Denio 213 (1848), it was thought that the expenses of removing an unlawful obstruction in the highway, was such a peculiar damage that an action would lie therefor.

But this is directly opposed to the late English case of *Winterbottom* v. *Lord Derby*, *supra*. The plaintiff there alleged "he was obliged to incur, and did incur on divers days, great expense in and about removing the said obstructions," and that allegation raises the question, said KELLY, C. B., whether this sort of damage is recoverable. "I think not; for if it were, anybody who desires to raise the question of the legality of an obstruction has only to go and remove it, and then bring an action for the expense of removing it. There would then be two modes open to everybody of trying whether the obstruction be lawful, namely, by indictment, or by action. But, if a person chose the latter way, and removes the obstruction, he only incurs an expense such as any one would who might go to remove the obstruction. The damage is, in one sense, special; but it is in fact common to all, who might wish, by removing the obstruction, to raise the question of the right of the public to use the way. I am of opinion that the true principle is, that he, and only he can maintain an action who has sustained some damage peculiar to himself, his trade or calling. A mere passer-by cannot do so, nor can a person who thinks fit to go and remove the obstruction. To say they could, would really be, in effect, to say that any of the Queen's subjects could."

II. When the obstruction complained of is immediately in front of or adjoining the plaintiff's premises, so as to directly prevent access thereto. Here the tendency is to allow a private action, when otherwise it might not be sustained.

Thus, in *Barron* v. *Mayor of Baltimore*, 2 Am. Jur. 203 (1829), the plaintiff owned a wharf in the city of Baltimore, and the city authorities diverted certain streams of water from their natural channels to a point just above the plaintiff's wharf, whereby large deposits of earth and sand were carried down and deposited near the wharf, materially lessening the depth of water at the wharf, and so impairing its value. A verdict for $4700 damages was sustained.

So, in *Green* v. *Kleinhans*, 2 Green (N J.) 472 (1834), it seems to have been held that if a man digs a ditch in a public highway, *immediately in front* of another's house, so that access to his premises becomes inconvenient and dangerous, this is such a special or peculiar damage as to maintain a private action.

In *Abbott* v. *Mills*, 3 Vt. 521 (1831), the plaintiff, who owned a building fronting on a public square, was allowed to recover private damages for erecting an out-building on the square itself, whereby "the enjoyment and value of the plaintiff's premises had been considerably lessened and impaired;" but the main question discussed was, whether the land, when the defendants erected their building, was, or was not public, and the opinion adds but little to the law on this vexed question.

Rose v. *Groves*, 5 M. & G. 613, better reported in 6 Scott N. R. 645 (1843), is the most emphatic English case to this point. An innkeeper, whose house abutted on a navigable river (the Thames), was allowed to recover 20*l.* damages for wrongfully placing timbers in the stream and keeping them there opposite the house, whereby access to the house was obstructed, and various persons prevented from coming there as guests; and proof was offered that the plaintiff's business had in fact fallen off since the obstruction, and the ruling was approved, principally upon the authority of *Iveson* v. *Moore*, referred to *infra*, and *Wilkes* v. *The Hungerford Market Co.*, 2 Scott 446, MAULE, J., saying, at page 616: "This is not an action for obstructing the river,

but for obstructing the access to the plaintiff's house on the river," but the court seem inclined to hold that even if the plaintiff was complaining of a public nuisance he could maintain the action on the facts thereon. See *Lyon* v. *Fishmongers Co.*, L. R., 1 App. Cas. 675 (1876).

This point was really involved in the late case of *Harvard College* v. *Stearns*, 15 Gray 1 (1860). The plaintiff there owned a wharf on one side of a creek, and the defendant owning the lot directly opposite, partially filled up the creek against the plaintiff's land, and a suit brought simply for depreciation in the value of the wharf, because neither the plaintiff's servants or other persons could approach it by water, but no evidence was offered or any claim made because of any actual hindrance or delay to the plaintiffs, but the claim was expressly put on the mere ground of "injury to the land by reason of an obstruction placed in a navigable stream or public way, whereby the land would be more difficult of access and less valuable." The action was not sustained. It may be inferred from the language used in this case, that the result might have been different had the plaintiffs offered evidence of obstruction to an actual passage or approach to their wharf, or of any injury to their property differing at all in kind from that which accrued in a greater or less degree to all riparian proprietors above. See *Brayton* v. *Fall River*, 113 Mass. 229. The precise ground of recovery pointed out so sharply in *Rose* v. *Groves*, 5 M. & G. 613, does not seem to have been brought to the attention of the court.

In *Blane* v. *Klumpke*, 29 Cal. 156 (1865), it was held that if obstructions in a navigable river affect the plaintiff only in common with the public at large, although in a greater degree, he cannot have his private action; yet if he is thereby obstructed in the *free use of his property* on said stream, and its comfortable enjoyment thereby prevented, this is a private and personal injury for which an action will lie. And see, also, *Yolo County* v. *City of Sacramento*, 36 Cal. 193 (1868).

So, in *Schulte* v. *North Pacific Transportation Co.*, 50 Cal. 592 (1875), it was held that if an obstruction is placed in a public street in front of the plaintiff's lot, which prevents him from having free access to his premises, he may have a private action against the person making the obstruction. See also, *Venard* v. *Cross*, 8 Kans. 248 (1871), in which the distinction is thoroughly brought out on page 255. Thus "it is alleged, say the court, that the erection of the dam, making the ford impassable, obstructs the highway. So far, it stands simply a wrong to the public, for which it alone can maintain an action. But it goes further, and alleges that this highway is the plaintiff's *only means of ingress and egress* to his land. Obstructing such a highway, therefore, prevents his access to his lands. There is disclosed a particular injury to the plaintiff; one differing in kind, not merely in degree, from that suffered by the community in general. It is not that the plaintiff uses this highway more than others, but that the way is a particular necessity for him—affords him an outlet to his farm. It is to him a use and benefit differing from those enjoyed by the public at large. He, therefore, can maintain a private action."

Both phases of this subject are well illustrated by the recent case of *Brayton* v. *Fall River*, 113 Mass. 218 (1873). The plaintiff owned a wharf and adjoining land situate upon a creek, in which the tide ebbed and flowed, and where he did a large grain and flour business; and the city of Fall River had, by its city drains, collected a large quantity of water into one main sewer, which discharged into the creek above the plaintiff's wharf, whereby gravel, sand and sediment was carried down and accumulated and partially filled up the creek in *front of the plaintiff's wharf*, and he had incurred

large expenses in removing the same, and had also expended large sums in getting vessels to his wharf over the obstructions. After a careful review of the Massachusetts authorities, which were supposed to restrict the right to bring a private suit within narrower limits than seems to have been adopted in the English cases, MORTON, J., said: "It follows, from the authorities we have cited, that the plaintiff cannot maintain a private action for any loss or injury to him arising merely from an obstruction to navigation caused by the defendants. If, for instance, the effect of the defendant's acts had been merely to create a bar across the mouth of the creek so as to destroy or injure its navigability, the plaintiff could not maintain an action because it was thereby rendered more difficult and expensive to reach his wharf, or because his wharf was rendered less valuable. Those would be injuries of the same kind, sustained by all other persons who have occasion to use the creek, or who owned land bordering upon it. But, in this case, the evidence tended to show that the effect of the sewers had been to fill up the creek directly in front of and adjoining the plaintiff's wharf, so that his vessels, which he was accustomed to employ to bring grain to his wharf and elevator, could not lie at the wharf on account of the diminished depth of water. We are of opinion that this was an injury, special and peculiar to him, for which he may maintain this action. He has a right to the water at his wharf at its natural depth. By the filling up of the creek, his use of his wharf for the purposes for which it had been constructed and actually used was impaired, and he was subject to an inconvenience and injury which was not common to the public. *Suppose a person had tipped stones off his wharf, forming a pile which prevented any profitable use of it, it would be an obstruction to the navigation of the creek*, and to that extent the injury would be a common one to all the public, but the plaintiff would suffer an injury in the hindrance of the use of his property, to which no one else would be exposed."

The recent case of *Lyon* v. *Fishmongers Co.*, in the House of Lords, 1 App. Cas. 662 (1876), is a direct adjudication upon the very point. See, also, *Haskell* v. *New Bedford*, 108 Mass. 216; *Clark* v. *Peckham*, 10 R. I. 35; *Frink* v. *Lawrence*, 20 Conn. 118; *Dobson* v. *Blackmore*, 9 Q. B. 991; *Knox* v. *New York*, 55 Barb. 404; *Walker* v. *Shepardson*, 2 Wis. 384.

The same discrimination was made in *Blood* v. *Nashua & Lowell Railroad Co.*, 2 Gray 137 (1854). The defendants built a bridge across a stream in such a manner as to somewhat obstruct navigation, and also caused the water to flow back upon the plaintiff's saw-mills; and he was allowed to recover for this last damage, because it was special and peculiar to himself; but not damages simply because it was made more inconvenient and expensive to float logs to his mills under the bridge; that being an injury suffered in common with the public, similar in kind and differing only in degree.

III. Where the obstruction, at some distance from the plaintiff's premises, so interferes with access thereto as to naturally impair their value.

In *Burrows* v. *Pixley*, 1 Root 362 (1792), the earliest reported case in America on this point, the plaintiff owned a ship-yard on a navigable river, where he carried on shipbuilding, and the defendant constructed a dam across the river below, by which the navigation was effectually obstructed, and he was allowed to maintain the action, although the declaration contained no allegation that any vessel had in fact been hindered or obstructed from going up and down the same, but this is a broader rule than is anywhere recognised.

Thus, in *Lansing* v. *Smith*, 8 Cowen 146 (1828), the plaintiff owned a dock in a basin on the Hudson river, in the city of Albany, and the defendant erected

an obstruction in the river, by which access to the dock was rendered inconvenient, and for vessels, with masts, quite impracticable, and so he lost the profits of it. There was no allegation of being actually hindered or any actual loss of sale or letting of the dock, but only a general allegation of depreciation of property resulting from these public obstructions; but he was not allowed to recover: Affirmed in 4 Wend. 9.

So, in *Dougherty* v. *Bunting*, 1 Sandf. 1 (1848), B. owned a store on South street, New York city, and in front of it was a wharf, extending into East river. Other parties were in the habit of piling wood on the wharf and street, which made B.'s store less accessible and valuable; and, although the plaintiff proved that he could rent the store if the wood could be removed, and that it was now unoccupied, and so the damages were not merely speculative and constructive, he was not allowed to recover. Following and approving *Lansing* v. *Smith*.

Equally clear was the case of *Brightman* v. *Fairhaven*, 7 Gray 271 (1856). The obstruction complained of was a dam across a navigable stream. The plaintiff owned land above the dam, and claimed damages upon the ground that the obstruction prevented the use of his land as a spar-yard, and interfered with his access thereto from the sea. In fact the plaintiff had never used his land for a spar-yard, either before or since the obstruction, although it was naturally well adapted to that purpose; but after the obstruction he had hired land below the dam for a year, and had been obliged to drag his spars by land to it. But the court held he could not maintain a private action, as the damages claimed were "such as might be sustained by the other owners of land on the stream by reason of its being navigable, and tending only to show a general depreciation of the land occasioned by the obstructions in the river."

In *Willard* v. *Cambridge*, 3 Allen 574 (1862), the alleged nuisance consisted in the removal of a bridge forming part of a highway; the plaintiff had a lumber, wood and coal wharf *adjacent* to the bridge, and alleged that he was injured in his business, that access to his wharf was destroyed, that his houses occupied by his tenants were rendered less desirable, and that he was obliged to abate from his rents in order to keep his tenants. But the court held these damages were of the same kind as those caused to all persons who owned property on the highway leading to the bridge, and who had occasion to use it, and were not special or peculiar to the plaintiff so as to create a good cause of action.

In *Fall River Iron Works Co.* v. *Old Colony & Fall River Railroad Co.*, 5 Allen 211 (1862), it was held that if the public nuisance complained of merely caused an obstruction to navigation, the plaintiffs had no private remedy, though the injury sustained by them was, by reason of their proximity to the nuisance, much greater in degree than that sustained by others.

And again in *Blackwell* v. *Old Colony Railroad*, 122 Mass. 1 (1877), this rule was emphatically repeated. The defendants built a bridge across a navigable stream. The planitiff owned land and a wharf above. His business was that of buying, selling and transporting merchandise to and from his wharf. His was the only wharf so used. By reason of the obstruction he was compelled to abandon his business, and transport his goods overland, at a cost of $1000 a year, and the value of his estate was greatly depreciated. But the declaration was held to contain no cause of action. "The case has no analogy," says GREY, C. J., "to those in which an obstruction in a navigable stream sets back the water upon the plaintiff's land, or being against the front of his land entirely cuts off his access to the stream, and thereby causes a direct and of

peculiar injury to his estate, or in which the carrying on of an offensive trade creates a nuisance to the plaintiff."

In some of these cases the damage to the plaintiff's estate might be considered speculative, theoretic and not capable of positive proof. And a different result has sometimes been reached, when damage has been found to have actually occurred.

Thus in *Baker* v. *Moore*, cited in 1 Ld. Raym. 491, the court thought an action would lie for obstructing a highway, in consequence of which the plaintiff's tenants left his houses, and he lost the profits of them.

So in *Stetson* v. *Faxon*, 19 Pick. 147 (1837), the defendant erected a warehouse which projected several feet into a public street in the city of Boston, and beyond the plaintiff's warehouse adjoining on the same street; by reason whereof, the plaintiff's warehouses were obscured from view of passers-by and travel was diverted to a distance, and the warehouses being less eligible for places of business, the plaintiff was obliged to reduce his rents; and the plaintiff was allowed to recover as special damage, the sum of $4010.12. This is probably the leading case in America on this precise phase of the subject. See *Cole* v. *Sprowle*, 35 Me. 161 (1852), much like it.

Iveson v. *Moore*, Holt 10; Comb. 480; 1 Ld. Raym. 486; 1 Com. 58; 1 Salk. 15; 12 Mod. 262 (11 Wm. 3.), has an important bearing on this question, if the final decision can be certainly ascertained. The plaintiff owned a colliery, and had dug a quantity of coal ready for sale. The defendant dug a colliery near the plaintiff's, and intending to draw away his customers and deprive him of the profit of his colliery, stopped up the highway by which the plaintiff used to carry his coals, so that carts and carriages could not come to his colliery, and he lost the sale of his coals as he alleged. After verdict for the plaintiff, judgment was stayed, because no special damages were sufficiently set forth; and on argument in the King's Bench, that court were equally divided, TOURTON and GOULD, JJ., thinking that the action would lie, and that here was special damage, "for all have not coal-pits." ROKEBY and HOLT, C. J., were of a contrary opinion. According to Salkeld, "The court being thus divided, and there being a former rule to stay judgment, no judgment could be entered."

According to the report in 12 Mod. 269, "judgment was stayed." Comberbach, Comyns and Ld. HOLT, himself, are all silent as to any other result or future consideration of the case. But at the end of the report in 1 Ld. Raym. 495, admitted by all, to be the fullest report in the case, we find this statement: "And afterwards, by consent of HOLT, this case was argued before all the justices of the Common Pleas, and barons of the Exchequer, at Serjeant's Inn, and they all were of opinion for the plaintiff, that the action well lay."

The next in order was *Hubert* v. *Groves*, 1 Esp. 148 (1794), the plaintiff was a coal and timber merchant, and the defendant totally obstructed the highway by which the plaintiff was accustomed to transport "all things necessary for his business," whereby he was "prevented from enjoying his premises, and carrying on his trade in so advantageous a manner as he had a right to do; and by which the plaintiff was obliged to carry his coals, timber, &c., by a circuitous and inconvenient way." Ld. KENYON nonsuited the plaintiff, and on motion for a new trial, the Court of King's Bench "concurred with the chief justice and refused the rule."

Wilkes v. *Hungerford Market Co.*, 2 Bing. N. C. 281, more fully stated in 2 Scott 446 (1835), is probably the leading case. The plaintiff, a bookseller, having a shop by the side of a public thoroughfare, Craven street, suffered in his business in consequence of passengers

having been diverted from the thoroughfare by an unauthorized obstruction across it for an unreasonable time. After verdict for the plaintiff for 30*l.*, the question was carefully argued on a motion for a nonsuit, and all the cases from the Year Books down were carefully examined, and the action sustained. The injury to the general public was that they could not walk in the same track as before; and for that cause alone a private action would not lie, but the special injury to this plaintiff was the loss of trade, which but for the obstruction he would have enjoyed, and for that an action was held to lie. *Hubert* v. *Groves*, was fully overruled.

Senior v. *The Metropolitan Railway Co.*, 2 H. & C. 258 (1863), has a very important bearing on this subject. The plaintiff was a draper and tailor, occupying a shop on Ray street, which he hired at a years' rental of 26*l.* The defendants constructed their road across Warner street, which connected with Ray street, nearly in front of the plaintiff's shop, which was about thirty yards from the railroad bridge on Warner street. The plaintiff claimed damages for the loss of his business by the obstruction to free travel which before existed, and not at all for injury to the property, *per se*, as he did not own it. A verdict for 60*l.* for loss of business alone was sustained after full argument. And *Chamberlain* v. *West End of London, &c., Railway Co.*, 2 B. & S. 604 (1862), is very similar. And see *Western Railroad Co.* v. *Hill*, 56 Penna. St. 460 (1857).

In *Benjamin* v. *Storr*, Law Rep., 9 C. P. 400 (1874), the plaintiff kept a coffee-house, in Rose street, a narrow street near Covent Garden. The defendants had a place of business fronting on King street, but with a rear entrance on Rose street, close adjoining the plaintiff's premises. The defendants kept their teams loading and unloading at their rear entrance so large a part of the time, that the plaintiff was obliged to burn gas all day for light, and access to this, his shop, was materially obstructed and the stench arising from the horses was so offensive as to materially lessen the business and profits of the coffee-house; and while the general rule was fully recognised, it was held sufficient private damage, and a verdict for 75*l.* was sustained.

This subject was elaborately considered in the late case of *Ricket* v. *Metropolitan Railway Co.*, 5 B. & S. 156 (1864), in which the facts were these: The plaintiff was lessee of a public-house in Crawford Passage, along which across Coppice Row was a public footway. The defendant railway company, for the purpose of their works, erected a hoarding in Coppice Row, and placed steps to enable foot passengers to pass up one side and down the other of a bridge over the hoarding. This was done in accordance with their duty under the statutes, and was so continued for about twenty months, when the premises were restored to their original condition; but after the bridge had been so erected, the number of passengers passing to and fro along Crawford Passage diminished, the refreshments sold by the plaintiff at his inn decreased in proportion, and because of the bridge, whereby the plaintiff's profits were much reduced, which the jury estimated to be 100*l.* The question was whether the plaintiff's premises were "injuriously affected" within the meaning of the statute, making the defendant liable, and it was thought by the court to be clear, that if the plaintiff would have had no cause of action at common-law against a person so obstructing the public way, he clearly would not have a claim under the statute, although the converse might not necessarily follow, since an action might lie at common law, for a special damage to a *personal* interest, while no compensation was given under the statute, unless *land* was injuriously

affected by the defendant's works. See 5 B. & S. 159; *Caledonian Railway Co.* v. *Ogilvy*, 2 Macq. 535. The first question considered then was, whether an action would have lain at common law, and the conclusion reached after a statement of the prior decisions was, that it would not; mainly because there was no obstruction to the exercise of any right of way by or on behalf of the plaintiff; that neither he himself had been obstructed, nor any one standing in a legal relation to him, such as servant, agent, tenant or any other relation which gives to the plaintiff a legal interest in their use of the way; but some unknown travellers having a free option to pass from north to south, either by Crawford Passage, or any other pass, have chosen some other pass because they do not like the steps at Coppice Row. The plaintiff has, say the court, no cause of action by reason of any obstruction direct to himself, the travellers who have chosen to turn out of their path to avoid the steps have none, and it seems unreasonable that an obstruction which created no cause of action, either for the plaintiff, or for the travellers separately, should by indirect consequence, become a cause of action to the plaintiff because the travellers exercised their choice as to their path and as to their refreshment—a choice in which the plaintiff had no manner of legal right. The plaintiff relied much upon the case of *Wilkes* v. *Hungerford Market Co.;* but ERLE, C. J., in giving judgment said, "That case is peculiar. We have found no other precedent of an action having been maintained on an obstruction of a highway, when the plaintiff was not obstructed in the exercise of any right vested in him, and the damage was not a more direct, natural and immediate consequence of the obstruction. If the same question were raised in an action now, we think it probable the action would fail, both from the effect of the cases which preceded *Wilkes's case*, and also from the reasoning in the *Caledonian Railway Co.* v. *Ogilvy*, 2 Macq. 229.

In that case a railway crossed a highway on a level, and the highway was stopped by two gates while the trains passed, and the plaintiff, living near those gates, suffered frequent inconvenience, an inconvenience more frequently repeated than as to other persons, but yet always of the same *kind*, and so no actionable special damage.

This decision was affirmed in the House of Lords in 1867 (Law Rep., 2 H. L. 176). Lord CHELMSFORD and Lord CRANWORTH delivering judgments for the defendants, and Lord WESTBURY a dissenting opinion in favor of the plaintiffs.

The history of the case thus presents this anomaly. The four judges of the Queen's Bench, COCKBURN, BLACKBURN, MELLOR and SHEE, two of the six judges of the Exchequer Chamber, KEATING and BYLES, Lord WESTBURY in the House of Lords, are all in favor of the plaintiff. Four judges of the Exchequer Chamber, and two members of the House of Lords, have pronounced judgments the other way, and the effect of the decision as an authority in this country may be reasonably supposed to be much impaired by such a difference of opinion. (See also *Senior* v. *The Metropolitan Railway Co.*, 2 H. & C. 258; *Cameron* v. *Charing Cross Railway Co.*, 16 C. B. (N. S.) 430) and Lord WESTBURY said: "It is a matter of regret that our judicial institutions should admit of these anomalies."

Rickett's case was decided apparently on the ground that the plaintiff's premises were not injured in value, but that his sole loss was temporarily to his *business;* and several later cases seem to hold that for injury to one's estate under like circumstances, a railroad company would be liable under the statutes, but without necessarily deciding they would have been at common law. See *Beckett* v. *Midland Railway Co.*, Law Rep., 3 C.

P. 82; *McCarthy* v. *Metropolitan Board of Works*, Law Rep., 7 C. P. 508 (1872), affirmed in Ex. Ch., 8 Id. 191.

In considering the foregoing cases where no private action has been allowed, care should be taken to discriminate between them and another class of cases, apparently similar, but really quite diverse, viz.: that class of nuisances when a wrong is directly done to private property, or the health of an individual is injured, or the peace and comfort of his home impaired by the carrying on of some offensive trade or occupation, which creates noxious smells or disturbing noises, or causes other annoyances and injuries to persons or property in the vicinity.

Now in all such cases it is quite immaterial how many other persons in the vicinity may suffer in like manner, in their persons or property from the same cause, or even though the nuisance become so general as to be properly the subject of indictment and public prosecution, this fact does not at all impair the right of every private individual to maintain an action for his own injuries. In cases of this character, the injury to private property, or to the health and comfort of individuals never becomes merged in the public wrong, so as to take away or prevent a person injured from maintaining an action for the damages which he himself has suffered. In all such cases the doctrine which runs through the foregoing cases has no application, and the distinctions there made become unimportant. Any such barrier to private actions, would not be consistent with sound principles. Carried out legally, it would deprive all persons of redress for injuries to their property or their health, or for personal annoyances and discomforts, whenever the nuisance was so extensive and general as to become a proper subject for a public prosecution; and would be offering in effect a premium on wrongdoing by establishing the rule that the greater number of persons whom the defendant could injure by his wrongful acts, the less liability he would be under to indemnify any one of them.

The distinction between such cases and those we have been thus far considering, has been well stated to be that "when the wrongful act is a disturbance or obstruction only to the exercise of some common and public right, and which every member of the state may exercise and enjoy, such as, for instance, the use of a highway, canal, a public landing place, a common watering place, or a stream or pond, a public navigable river, and the like, the sole remedy is by public prosecution, unless special damage is caused to the plaintiff; for in such cases, the *act itself* does no wrong to the individual distinct from that done to the whole community; but whenever the alleged nuisance would of itself constitute a private wrong by directly injuring the property, health or comfort of a person, and for which an action could be maintained, if no other person was so injured, it is none the less actionable because the wrong is committed in a manner and under such circumstances as to render the guilty party liable to an indictment for a common nuisance. Multiplicity of actions in such cases, affords no reason for denying a person all remedy for actual loss or injury he has sustained in his person or property by the unlawful acts of another; whereas that may be a valid objection to maintaining private action for what is a nuisance of a more common and public right."

It is true this distinction may have sometimes been lost sight of, and courts have sometimes labored, unnecessarily, to maintain actions on the mere ground of special and peculiar damages, differing in kind from those sustained by the general public; and undoubtedly the case of *Bonner* v. *Welborn*, 7 Geo. 296 (1849), and others like it might well rest on that ground.

In *Bonner* v. *Welborn*, the plaintiff was the owner of some medicinal springs, much resorted to by invalids; the defendant erected a mill-dam and pond in the vicinity, which through the apprehension of sickness by visitors detained them from visiting the place, whereby the profits of the establishment were reduced nearly $20,000 in two years, and plaintiff was permitted to recover.

But that such actions may be maintained on the broader ground of direct injury to the plaintiff property or business, by a wrongful act of the defendant, whatever be the number of persons injured, is clearly established by a long series of adjudications. See *Soltau* v. *De Held*, 2 Sim. (N. S.) 133; *Tipping* v. *St. Helen's Smelting Co.*, 4 B. & S. 608, and 11 H. L. C. 642; *Wesson* v. *Washburn Iron Co.*, 13 Allen 95; *Bamford* v. *Turnley*, 3 B. & S. 66; *Spencer* v. *London & Birmingham Railway Co.*, 8 Sim. 193; *Francis* v. *Schoellkopf*, N. Y. 152; *Greene* v. *Nunnemacher*, 36 Wis. 50.

From this review of the authorities on this vexed question, although they may not all be easily reconciled, certainly not without subtle and refined distinctions, some general principles are fairly deducible, which may be thus stated:

1st. For any act obstructing a public and common right, no private action will lie for damages of the same *kind* as those sustained by the general public, although in a much greater degree than any other person.

2d. An action will lie for peculiar damages of a different kind, though even in the smallest degree.

3d. The damages if really peculiar need not always be direct and immediate, like the loss of a horse, but may be as remote and consequential as in other cases of tort.

4th. The fact that many others sustain an injury of exactly like kind is not a bar to individual actions in many cases of a public nuisance.

EDMUND H. BENNETT.

Supreme Court of Judicature. Court of Appeal.

THE QUEEN *v.* ORTON.

By the common law, several distinct misdemeanors of the same kind may be charged in different counts of the same indictment. The practice is different in the case of several felonies, but *semble*, even that is within the discretion of the court.

Upon conviction of several offences, whether in separate indictments or in separate counts of the same indictment, sentence upon one may be made to take effect after the expiration of the sentence on another of them.

False testimony given upon two different occasions, though the language used and the object in view were the same in both, and both were parts of the same general judicial proceeding, constitute two distinct perjuries, for which separate and cumulative sentences may be imposed.

THIS was a common-law indictment for perjury, containing two counts; one offence was alleged to have been committed before a master in chancery, and the other in open court, at a trial at law in the Court of Common Pleas at Westminster; the one was ancillary to the other, the object being the recovery of the Tichborne